

SERVICE DATE – LATE RELEASE SEPTEMBER 15, 2005

## SURFACE TRANSPORTATION BOARD

### DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

STB Docket No. AB-976X

#### PITTSBURG & SHAWMUT RAILROAD, LLC—ABANDONMENT EXEMPTION—IN ARMSTRONG AND JEFFERSON COUNTIES, PA

Decided: September 15, 2005

By petition filed on June 9, 2005, Pittsburg & Shawmut Railroad, LLC (Pittsburg & Shawmut), a subsidiary of Buffalo & Pittsburgh Railroad, Inc. (BPRR), seeks an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 to abandon a line of railroad between milepost 22.0 south of Brookville in Jefferson County, PA, and milepost 62.0 in Mahoning in Armstrong County, PA, a distance of approximately 40.0 miles.<sup>1</sup> Notice of the filing was served and published in the Federal Register on June 29, 2005 (70 FR 37492-93). A request for issuance of a notice of interim trail use (NITU) and for imposition of a public use condition was filed on July 22, 2005, by Armstrong County Board of Commissioners and Jefferson County Board of Commissioners (Counties). Pittsburg & Shawmut filed separate replies to the NITU and trail use requests. We will grant the petition for exemption, subject to trail use, public use, environmental, and standard employee protective conditions.

### BACKGROUND

According to Pittsburg & Shawmut, there has been no traffic on the line since September 1999, when the last customer, Doverspike Brothers Coal Company (DBCC), ceased operations. Pittsburg & Shawmut states that it has unsuccessfully attempted to bring new business to the line, but that no traffic has originated or terminated on this line since that time. Petitioner adds that all overhead traffic has been rerouted. Pittsburg & Shawmut indicates that, because of the lack of use, it proposes to abandon the line and to salvage the track materials.

### DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10903, a rail line may not be abandoned without the Board's prior approval. Under 49 U.S.C. 10502, however, the Board must exempt a transaction or service from regulation when it finds that: (1) continued regulation is not necessary to carry out the rail

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<sup>1</sup> The subject line is currently operated by BPRR, which simultaneously filed a notice of exemption in STB Docket No. AB-369 (Sub-No. 5X) to discontinue its operations over the line. That exemption, served and published in the Federal Register on June 29, 2005 (70 FR 37491), became effective on July 29, 2005.

transportation policy of 49 U.S.C. 10101; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power.

Detailed scrutiny under 49 U.S.C. 10903 is not necessary to carry out the rail transportation policy. By minimizing the administrative expense of the application process, an exemption will reduce regulatory barriers to exit [49 U.S.C. 10101(7)]. An exemption will also foster sound economic conditions and encourage efficient management by relieving Pittsburg & Shawmut of the costs of owning, rehabilitating, and maintaining a line that is not in use [49 U.S.C. 10101(5) and (9)]. Other aspects of the rail transportation policy will not be adversely affected.

Regulation of the proposed transaction is not necessary to protect shippers from the abuse of market power. The line has been out of service for almost 6 years and there are no active shippers located on the line. Nevertheless, to ensure that DBCC is informed of our action, we will require Pittsburg & Shawmut to serve a copy of this decision and notice on DBCC within 5 days of the service date of this decision and notice and to certify to the Board that it has done so. Given our market power finding, we need not determine whether the proposed transaction is limited in scope.

Under 49 U.S.C. 10502(g), we may not use our exemption authority to relieve a carrier of its statutory obligation to protect the interests of its employees. Accordingly, as a condition to granting this exemption, we will impose the employee protective conditions set forth in Oregon Short Line R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979).

Pittsburg & Shawmut has submitted an environmental report with its petition and has notified the appropriate Federal, state, and local agencies of the opportunity to submit information concerning the energy and environmental impacts of the proposed action. See 49 CFR 1105.11. The Board's Section of Environmental Analysis (SEA) has examined the environmental report, verified the data it contains, and analyzed the probable effects of the proposed action on the quality of the human environment. SEA served an environmental assessment (EA) on July 13, 2005. Comments to the EA were requested by August 12, 2005.

In the EA, SEA stated that the Pennsylvania Department of Environmental Protection (DEP), Southwest Regional Office, had expressed concerns regarding environmental cleanup, soils and waterways, and water supply management. Therefore, to address DEP's concerns, SEA recommended that, prior to the commencement of any salvage activities, Pittsburg & Shawmut contact DEP at (412) 442-4189, concerning potential site contamination and environmental protection liability, storage tank removal, maintenance of water obstructions, and mitigation practices to avoid possible impacts to downstream public water supplies.

SEA also stated that the National Geodetic Survey (NGS) had advised SEA that one geodetic station marker had been identified along the rail line that might be affected by the proposed abandonment, and had requested 90 days' advance notification of any activities that would disturb or destroy the marker in order to plan for its relocation. Therefore, SEA

recommended a condition requiring Pittsburg & Shawmut to notify NGS 90 days prior to beginning salvage activities to allow NGS to plan for that possible relocation.

Finally, Pittsburg & Shawmut had submitted a historic report and had served the report on the Pennsylvania Historical and Museum Commission (the State Historic Preservation Office or SHPO). See 49 CFR 1105.8. SEA stated in the EA that the SHPO had not yet completed its evaluation of the potential impact of the proposed abandonment. Therefore, SEA recommended in the EA that, pending completion of the SHPO's review, a condition be imposed requiring Pittsburg & Shawmut to retain its interest in and take no steps to alter the historic integrity of all sites and structures on the right-of-way that are 50 years or older until completion of the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f (NHP).

Based on comments received to the EA, SEA has revised its recommendations. SEA has indicated that, in an email dated August 11, 2005, NGS states that it has no objection to the immediate salvage of rail materials, and that, in a letter dated July 13, 2005, the SHPO indicates that it has completed its review of the proposed abandonment and has determined that there are no National Register eligible or listed historic or archaeological properties in the area of this proposed project.

Based on NGS's comments, SEA recommends that the previously discussed NGS condition not be imposed as it is no longer necessary. Also, based on the SHPO's comment, SEA states that the Board's responsibilities under section 106 are fulfilled and SEA therefore recommends that the previously discussed section 106 condition not be imposed as it is also no longer necessary.

The environmental conditions recommended by SEA in the EA, as revised based on the comments received, will be imposed. Based on SEA's recommendations, we conclude that the proposed abandonment, if implemented as conditioned, will not significantly affect either the quality of the human environment or the conservation of energy resources.

The Counties submitted a late-filed<sup>2</sup> request for the issuance of a NITU under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act), and for imposition of a public use condition under 49 U.S.C. 10905. They have also submitted a statement of willingness to assume financial responsibility for the right-of-way, and have acknowledged that use of the right-of-way would be subject to possible future reconstruction and reactivation of the right-of-

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<sup>2</sup> The June 29, 2005 notice provided that trail use/rail banking requests were to be filed by July 19, 2005. The Counties' request was filed on July 22, 2005. However, in Aban. and Discon. of R. Lines and Transp. Under 49 U.S.C. 10903, 1 S.T.B. 894, 900 (1996) and 2 S.T.B. 311 (1997), the Board retained the policy of accepting filings after the due date when good cause is shown. Because there is no indication that the Counties' late-filed request will prejudice any party, it will be accepted. See Wheeling & Lake Erie Railway Company—Abandonment Exemption—in Starke County, OH, STB Docket No. AB-227 (Sub-No. 10X), slip op. at 1 n.1 (STB served Nov. 7, 1997).

way for rail service, as required under 49 CFR 1152.29. By letter filed on July 26, 2005, Pittsburg & Shawmut states that it is willing to negotiate with the Counties for that portion of the right-of-way between milepost 24.0 and milepost 56.0,<sup>3</sup> provided that it is not prevented from salvaging the tracks, ties, signal equipment and other track materials or property outside of the right-of-way that would be necessary for trail use. Because the Counties' request complies with the requirements of 49 CFR 1152.29, and Pittsburg & Shawmut is willing to enter into trail use negotiations, we will issue a NITU for that portion of the subject line. The parties may negotiate an agreement during the 180-day period prescribed below. If an agreement is executed, no further Board action is necessary. If no agreement is reached within 180 days (and if the line is not purchased or subsidized pursuant to an OFA), Pittsburg & Shawmut may fully abandon the line, subject to the conditions imposed below. See 49 CFR 1152.29(d)(1). Use of the right-of-way for trail purposes is subject to restoration for railroad purposes.

SEA indicated in its EA that, following abandonment and salvage of the line, the right-of-way may be suitable for other public use. The Counties also request imposition of a 180-day public use condition. They state that the rail corridor in question is along a scenic watershed, that the corridor would make an excellent recreational trail, and that conversion of the property to trail use is in accordance with local plans. The Counties add that the corridor provides important wildlife habitat and open space and that its preservation as a recreational trail is consistent with that end. The Counties explain that the length of the requested condition, 180 days, is needed because they have not had an opportunity to assemble or to review title information. In its reply, Pittsburg & Shawmut opposes imposition of a public use condition here.

Persons who request a Trails Act condition may also request a public use condition under 49 U.S.C. 10905. See Rail Abandonments—Use of Rights-of-Way as Trails, 2 I.C.C.2d 591, 609 (1986) (Trails). When both conditions are appropriate, it is our policy to impose them concurrently, subject to the execution of a trail use agreement. Although petitioner opposes the request, the Counties have met the public use criteria prescribed at 49 CFR 1152.28(a)(2) by specifying: (1) the condition sought; (2) the public importance of the condition; (3) the period of time for which the condition would be effective; and (4) justification for the period of time requested. Accordingly, a 180-day public use condition, commencing from the effective date of this decision and notice, will be imposed covering the entire rail line to be abandoned to enable any state or local government agency or other interested person to negotiate the acquisition of the line for public use. If a trail use agreement is reached on a portion of the right-of-way, Pittsburg & Shawmut must keep the remaining right-of-way intact for the remainder of the 180-day period to permit public use negotiations. Also, we note that a public use condition is not imposed for the benefit of any one potential purchaser. Rather, it provides an opportunity for any interested person to negotiate to acquire the right-of-way that has been found suitable for public purposes, including trail use. Therefore, with respect to the public use condition, Pittsburg & Shawmut is

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<sup>3</sup> Pittsburg & Shawmut indicates that it intends to retain the track between milepost 22.0 and milepost 24.0, as well as the track between milepost 56.0 and milepost 62.0, for operation by BPRR as private sidetracks or spurs.

not required to deal exclusively with the Counties, but may engage in negotiations with other interested persons.

The parties should note that operation of the trail use and public use procedures could be delayed, or even foreclosed, by the OFA process under 49 U.S.C. 10904. As stated in Trails, 2 I.C.C.2d at 608, OFAs to acquire rail lines for continued rail service or to subsidize rail operations take priority over interim trail use/rail banking and public use. Accordingly, if an OFA is timely filed under 49 CFR 1152.27(c)(1), the effective date of this decision and notice will be postponed beyond the effective date indicated here. See 49 CFR 1152.27(e)(2). In addition, the effective date may be further postponed at later stages in the OFA process. See 49 CFR 1152.27(f). Finally, if the line is sold under the OFA procedures, the petition for abandonment exemption will be dismissed and trail use and public use precluded. Alternatively, if a sale under the OFA procedures does not occur, the trail use and public use processes may proceed.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Under 49 U.S.C. 10502, we exempt from the prior approval requirements of 49 U.S.C. 10903 the abandonment of the above-described line, subject to the employee protective conditions set forth in Oregon Short Line R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979), and the conditions that Pittsburg & Shawmut shall: (1) leave intact all of the right-of-way, including bridges, trestles, culverts and tunnels (except track, ties, and signal equipment) for a period of 180 days from the effective date of this decision and notice, to enable any state or local government agency or any other interested person to negotiate the acquisition of the line for public use; (2) comply with the terms and conditions for implementing interim trail use/rail banking, as set forth below; and (3)(a) contact DEP, Southwest Regional Office, at (412) 442-4189, concerning potential site contamination and environmental protection liability, storage tank removal, maintenance of water obstructions, and mitigation practices to avoid possible impacts to downstream public water supplies, and (b) report the results of this consultation in writing to SEA.

2. Pittsburg & Shawmut is directed to serve a copy of this decision and notice on DBCC within 5 days after the service date and to certify to the Board that it has done so.

3. If an interim trail use/rail banking agreement is reached for that portion of the line between mileposts 24.0 and 56.0, it must require the trail user to assume, for the term of the agreement, full responsibility for management of, any legal liability arising out of the transfer or use of (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability), and for the payment of any and all taxes that may be levied or assessed against, the right-of-way.

4. Interim trail use/rail banking is subject to the future restoration of rail service and to the user's continuing to meet the financial obligations for the right-of-way.

5. If interim trail use is implemented and subsequently the user intends to terminate trail use, it must send the Board a copy of this decision and notice and request that it be vacated on a specified date.

6. If an agreement for interim trail use/rail banking is reached by the 180th day after service of this decision and notice, interim trail use may be implemented. If no agreement is reached by that time, Pittsburg & Shawmut may fully abandon the line, provided the conditions imposed above are met.

7. An OFA under 49 CFR 1152.27(c)(1) to allow rail service to continue must be received by the railroad and the Board by September 23, 2005, subject to time extensions authorized under 49 CFR 1152.27(c)(1)(i)(C). The offeror must comply with 49 U.S.C. 10904 and 49 CFR 1152.27(c)(1). Each OFA must be accompanied by the filing fee, which currently is set at \$1,200. See 49 CFR 1002.2(f)(25).

8. OFAs and related correspondence to the Board must refer to this proceeding. The following notation must be typed in bold face on the lower left-hand corner of the envelope: "Office of Proceedings, AB-OFA."

9. Provided no OFA has been received, this exemption will be effective on October 15, 2005. Petitions to stay must be filed by September 30, 2005, and petitions to reopen must be filed by October 10, 2005.

10. Pursuant to the provisions of 49 CFR 1152.29(e)(2), Pittsburg & Shawmut shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line. If consummation has not been effected by Pittsburg & Shawmut's filing of a notice of consummation by September 15, 2006, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire. If a legal or regulatory barrier to consummation exists at the end of the 1-year period, the notice of consummation must be filed no later than 60 days after satisfaction, expiration, or removal of the legal or regulatory barrier.

By the Board, Chairman Nober, Vice Chairman Buttrey, and Commissioner Mulvey.

Vernon A. Williams  
Secretary